

We are still watching the cases presented at the meeting last month, especially the Wanger cases. There is nothing significant to report, but I would like to introduce two other Delta-related cases—one dealing with FEMA and the Federal ESA implications for the National Flood Insurance Program and the other case dealing with the state area of origin statutes and the potential impact on water supply.

**Coalition for a Sustainable Delta v. F.E.M.A.**

The first is a case brought by the Coalition for a Sustainable Delta and Kern County Water Agency against FEMA filed on March 12, 2009.

The complaint centers on the National Flood Insurance Program (NFIP) which offers subsidized flood insurance to property owners in eligible local communities. Eligibility depends upon the adoption of adequate land use and control measures in accordance with the criteria developed by FEMA. The criteria include reducing threats to lives and minimizing damage to structures and water systems. The criteria do not address threatened or endangered species or other environmental concerns. If the community fails to implement the minimum land-use regulations, FEMA may suspend the community's participation in the NFIP, thus making subsidized flood insurance unavailable.

According to the Plaintiffs, the incentives of the NFIP lead to additional development in the flood-prone areas of the Delta which may adversely impact four ESA-listed species—the delta smelt, the Sacramento River winter-run Chinook salmon, the Central Valley spring-run Chinook salmon, and the Central Valley steelhead—in violation of the ESA. The encouraged development may harm listed species by converting tidal wetlands into upland development and by increasing wastewater and urban runoff which contain contaminants that harm the listed species.

The case is in the Eastern District Court of California. Judge Wanger recently denied a motion to dismiss and the Plaintiffs were granted leave to amend the complaint.

**Solano County Water Agency v. DWR**

The second case is *Solano County Water Agency v. DWR*. The Plaintiffs in this case, Solano County Water Agency and others, signed long-term water supply contracts with DWR in 1963. The contracts include a shortage provision which states DWR will

proportionately reduce water supply to the contractors in times of shortage. This provision, by its own terms, does not apply to those with “established rights under the area of origin statutes.”

The area of origin laws refer to a number of different statutes which “reserve for the areas where water originates some sort of right to such water for future needs which is preferential or paramount to the right of outside areas.”

One such statute is the Watershed Protection Act which limits the CVP and SWP from depriving those located within the watershed of water reasonably required to supply the beneficial needs of the watershed. It reserves for the entire body of inhabitants in watersheds of origin a priority in establishing their own water rights as against the CVP and SWP. Recent case law (*The State Water Resources Control Board Cases*) found that the Watershed Protection Act reserves an inchoate priority for the beneficial use of water within its area of origin.

According to a 2008 Attorney General Letter prepared for Delta Vision, the Watershed Protection Act has the greatest potential of all the area of origin statutes “to reduce water supply presently enjoyed by export water users by allowing those in the watershed to perfect new water rights to natural flow in those areas which will have priority over the water rights of the CVP and SWP.”

The Plaintiffs in this case assert that because of their location within the watershed they are entitled to protection by the area of origin statute. Therefore, they are exempt from the shortage provision of the water supply contracts.

DWR notified the plaintiffs in October 2007 that water deliveries would be at 60% of their contractual allocations. The plaintiffs then filed suit in Sacramento Superior Court in July 2008 claiming breach of contract.

DWR contends that the area of origin statutes do not automatically confer any water rights to the users, but merely preserve the ability of water users within the watershed to obtain priority rights by application with the SWRCB. DWR further claims that the Plaintiffs have been subject to water reductions in the past but are only now asserting exemption from the shortage provision of the water contract. This conduct, according to DWR, implies that Plaintiffs are subject to annual reductions since they failed to object in the past.

The Plaintiffs deny that there are any prerequisites to perfecting area of origin protections.

Both parties moved for summary judgment and the court denied both motions in September of this year. In the tentative ruling, the court concluded that there were factual issues in dispute that must go to trial. One such issue is whether or not the Plaintiff's must apply for a permit with the SWRCB before asserting protections under the area of origin statute.

Currently we are waiting for the judge to issue a final decision on the summary judgment motions.